

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 19, 2009

STATE OF TENNESSEE v. RAYMOND POINDEXTER

**Appeal from the Circuit Court for Marshall County
Nos. 15324 and 15738 Robert Crigler, Judge**

No. M2008-02440-CCA-R3-CD - Filed September 22, 2009

The Defendant, Raymond Poindexter, pleaded guilty to one count of failure to appear, a Class E felony. See Tenn. Code Ann. § 39-16-609(e). The trial court sentenced him to one year in the Department of Correction, that sentence to be served consecutively to the nine-year sentence for which he failed to appear and three additional Coffee County sentences, for a total effective sentence of twenty years in the Department of Correction. In this direct appeal, he contends that the trial court erred in ordering consecutive sentences. After our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Jheri Beth Rich, Lewisburg, Tennessee, for the appellant, Raymond Poindexter.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Charles Crawford, District Attorney General, and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Defendant was sentenced on October 22, 2008. Terese Frazier, a probation department employee, prepared the Defendant's presentence report. Her testimony, combined with that of the Defendant, established that on July 11, 2003, the Defendant had pleaded guilty to selling .5 grams or more of cocaine. He was ordered to appear back in court on July 14, 2003, on which date the judgment would have been entered and he would have been sentenced in accordance with his plea agreement. He failed to report, however, until surrendering himself in November 2007. In the interim, he was convicted in Coffee County for three counts of selling cocaine and sentenced to three

concurrent ten-year terms for those offenses. He apparently had not been incarcerated for those offenses before surrendering in November 2007.

Thus, the October 22, 2008 sentencing hearing was for the purpose of sentencing the Defendant upon his open plea of guilty to failure to appear, a Class E felony. At this hearing, the sentencing judge was also to impose the sentence against the Defendant for nine years in accordance with the Defendant's July 1, 2003 plea agreement. Finally, the sentencing judge was to determine whether the sentences imposed would be served concurrently with or consecutively to each other and the other sentences already being served.

The Defendant testified at his sentencing hearing that he suffered from congestive heart disease, coronary artery disease, pancreatic cancer, high blood pressure, and diabetes. He took sixteen different medications and a total of forty-one pills per day. He said that he intended to report on July 14, 2003, as ordered, but decided not to after talking to his family. He and his family were concerned about his ability to receive adequate medical care in prison. During 2003, 2004, and 2005, he obtained treatment for his pancreatic cancer. He said he turned himself in after determining that his cancer was under control. He also said he spent most of those three years in Indiana and Illinois because he was ineligible for TennCare coverage, but returned periodically to Coffee County in order to contact his source for cocaine. He admitted he had sold drugs on numerous occasions and could not provide an exact number. On cross-examination, he acknowledged that a 2006 letter from his doctor stated that he had no reoccurrence of pancreatic cancer. He also acknowledged that, as a Vietnam veteran, he could have visited a Veterans Affairs ("VA") hospital at any time; he chose not to for years, however, because he did not trust VA doctors.

The trial court ordered the Defendant to serve his one-year failure to appear sentence consecutively to the underlying nine-year sentence. It also ordered that those sentences be served consecutively to his three concurrent ten-year sentences from Coffee County, for a total effective sentence of twenty years in the Department of Correction. The Defendant now appeals.

Analysis

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court’s findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

The presentence report in this case indicates that the Defendant, at the time of sentencing, was a fifty-nine-year-old male. He was separated from his wife, and he had two children. The Defendant reported that he attended school through the eighth grade. He also reported service in the United States Air Force from 1967 to 1971, after which he was discharged. His military record revealed four instances of being absent without leave. The Defendant reported that he was disabled and had no employment history due to his medical conditions.

The presentence report also documents a number of prior criminal offenses, including five 1998 convictions for passing worthless checks, one 1999 conviction for evading arrest, four convictions for selling cocaine between 2001 and 2004, and a 2002 conviction for possession of unlawful drug paraphernalia.

On appeal, the Defendant challenges only the trial court’s imposition of consecutive sentences. The trial court imposed consecutive sentences based on its findings that the Defendant is an offender whose record of criminal activity is extensive and that he was on probation when he committed the offense for which he was being sentenced. See Tenn. Code Ann. §§ 40-35-115(b)(2), (6).

The Defendant contends that the trial court erred by ordering him to serve his sentences consecutively to his Coffee County, concurrent sentences because judgment had not been entered for the underlying sale of cocaine before October 22, 2008, the day he was sentenced for his failure to appear. The judgment forms in this case reflect an October 22, 2008 entry of judgment on that conviction for sale of cocaine. The Defendant contends that this ran afoul of Tennessee Code Annotated section 40-35-115(a)’s requirement that consecutive sentencing be imposed only “[i]f a defendant is convicted of more than one [] criminal offense.”

We conclude that the trial court did not err by sentencing the Defendant to serve his sentence for failure to appear consecutively to his 2004 conviction for sale of cocaine, as the failure to appear statute provides that “[a]ny sentence received for a violation of this section may be ordered to be served consecutively to any sentence received for the offense for which the defendant failed to appear” regardless of the consecutive sentencing statute. See Tenn. Code Ann. § 39-16-609(f). We also conclude that the record supports the trial court’s finding that the Defendant has an extensive record of criminal activity, thus justifying the trial court’s consecutive sentencing decision as to the Defendant’s Coffee County sentences. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the trial court’s imposition of consecutive sentences.

DAVID H. WELLES, JUDGE